

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE POKÉMON COMPANY
INTERNATIONAL, INC.

Plaintiff,

v.

MARCUS FRASIER,

Defendant.

No. 2:14-cv-112

PLAINTIFF'S SUPPLEMENTAL BRIEF IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE

ORAL ARGUMENT REQUESTED

**REDACTED
CONFIDENTIAL MATERIAL FILED
UNDER SEAL**

I. INTRODUCTION

Pokémon submits this supplemental brief in accordance with the Court's May 29, 2014 Minute Order. See Dkt. #27. Pokémon's jurisdictional discovery has revealed the following additional contacts between Frasier's infringing activities and Washington:

- **Over 1,600** Washington users have downloaded the infringing Pokollector App;
- The infringing Pokollector Website has received **over 1,000** visits from Washington users;
- Frasier receives advertising revenue from users (including from users in Washington); and

- Frasier also receives referral revenue from [REDACTED]

Given these additional connections between Frasier's infringing activities and the State of Washington, there can be no question that Frasier is subject to jurisdiction here.

II. SUPPLEMENTAL STATEMENT OF FACTS

A. Users of the Website and App Reside in Washington

Both Frasier's Pokellector Website and App are available to users throughout the U.S. and worldwide. Supp. Jennison Decl.¹ Ex. A (Frasier Dep. at 24:24-25:14, 71:1-7). Since April 2013, the Pokellector Website has received over 53,000 visits. *Id.*, Ex. A (Frasier Dep. at 71:21-73:2), Ex. C (Frasier Dep. Ex. 3). The App is even more popular; between 10,000 and 50,000 users have installed the App through Google Play and over 135,000 users have installed the App on Apple's iTunes. *Id.*, Ex. A (Frasier Dep. at 38:22-39:14), Ex. B (Frasier Dep. Ex. 1 at POKEMON001585), Ex. G (Decl. of Apple Inc. Custodian of Records (Oct. 9, 2014) ("Apple Decl."), ¶ 8).

Both the Website and App are used by Washington residents. According to Frasier's own records, users in Washington visited the Pokellector Website at least 1,019 times between April 1, 2013 and July 28, 2014. *Id.*, Ex. A (Frasier Dep. at 71:21-73:2, 74:23-76:12), Ex. D (Frasier Dep. Ex. 4). Indeed, Washington ranks as the state with the tenth highest usage of the Pokellector Website. *Id.*, Ex. A (Frasier Dep. at 76:10-24), Ex. D (Frasier Dep. Ex. 4). By registering on the Pokellector Website users can use the site to help manage their trading card collections. Compl., Ex. E at 14 ("You must be logged in to track your collection."). Users register for the Pokellector Website by providing an email address, user name, and password. Supp. Jennison Decl., Ex. A (Frasier Dep. at 43:9-20). Frasier records the IP address of all users at the time of registration. *Id.*, Ex. A (Frasier Dep. at 43:23-44:3, 44:13-46:4, 78:1-12), Ex. E

¹ Supplemental Decl. of Judith Jennison In Supp. of Pl.'s Opp'n to Def.'s Motion to Dismiss for Lack of Jurisdiction or, In the Alternative, to Transfer Venue (Oct. 10, 2014).

1 (Frasier Dep. Ex. 5). Those records reflect at least 22 registered users of the Pokellektor Website
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3 registered from an IP address located in Washington. See Supp. Gonzalez Decl.,² ¶ 3. The
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5 Pokellektor App has been downloaded from the Apple iTunes store to 1,674 users in the State of
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7 Washington. Supp. Jennison Decl., Ex. G (Apple Decl. ¶ 8).
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9 **B. The Website and App Generate Revenue From Washington**

10 The Pokellektor Website and App generate income in two ways. See Supp. Jennison
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12 Decl., Ex. A (Frasier Dep. at 29:21-30:8). First, the App and Website display, along with the
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14 Pokellektor Images, pricing information for the purchase of Pokémon TCG trading cards on the
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16 secondary market. See Compl. ¶ 32 (example of pricing information from App) & Ex. E at 20
17
18 (example of pricing information from Website). The pricing information includes a list of
19
20 various third party websites selling each trading card, along with the price listed at each site and
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22 a hyperlink to that site. Id. [REDACTED]
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24 [REDACTED] Supp. Jennison Decl., Ex. A (Frasier Dep. at 17:4-18:11,
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26 19:4-16, 22:10-18, 79:16-20).
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28 [REDACTED]
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30 [REDACTED] Id., Ex. A (Frasier Dep. at 21:3-22:2, 126:5-128:15), Ex. F (Frasier Dep. Ex. 20).
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33 Second, the Pokellektor App generates almost \$200 per month in revenue through banner
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35 ads displayed in the App itself. Id. (Frasier Dep. at 30:22-31:9, 33:21-34:5). This revenue is
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37 generated when banner ads are displayed to users and when users click on those ads. Id. (Frasier
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39 Dep. at 31:11-24). Accordingly, Frasier earns money as the result of activity in Washington
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41 when ads are displayed to Washington App users.³
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47 ² Supplemental Decl. of Elva Gonzalez In Support of Plaintiff's Opposition to Defendant's Motion to
48 Dismiss for Lack of Jurisdiction or, In the Alternative, to Transfer Venue (Oct. 10, 2014).

49 ³ Frasier has programmed the App to permit a third party to serve the ads, so Frasier himself has no
50 knowledge of what users where have seen or clicked on advertisements. Supp. Jennison Decl., Ex. A (Frasier Dep.
51 at 30:22-31:2). But given the number of users in Washington, there is a high likelihood that some of Frasier's
revenue is generated by users in Washington.

III. ARGUMENT

As discussed in Pokémon's Opposition, this Court may exercise personal jurisdiction if:

(a) Frasier has purposefully directed his activities or consummated some transaction with Washington (or a resident of Washington); (b) Pokémon's claims arise out of or relate to Frasier's forum-related activities; and (c) the exercise of jurisdiction comports with fair play and substantial justice. Mavrix Photo, Inc. v. Brand Technologies, Inc., 647 F.3d 1218, 1227-28 (9th Cir. 2011); see also Dkt. #19, Pl.'s Opposition to Def.'s Motion to Dismiss for Lack of Jurisdiction or, In the Alternative, to Transfer Venue) (April 11, 2014) ("Opposition") at 5.

In the prior briefing, the parties focused on the impact of Frasier's infringing activities on Pokémon in Washington. Under the Calder "effects test," Frasier is subject to jurisdiction where he has "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Marvix, 647 F.3d at 1228; see also Dkt. #10, Def.'s Motion to Dismiss for Lack of Jurisdiction or, In the Alternative, to Transfer Venue (March 18, 2014) ("Motion") at 8-9; Opposition at 6. In its Opposition, Pokémon demonstrated that Frasier's infringing App and Website meet each element of the effects test, as construed by Washington Shoe. See Opposition at 6-8.

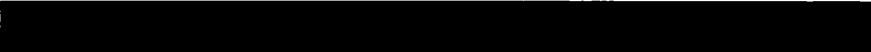
But Frasier's impact on Pokémon is not the only basis for jurisdiction here. In the Internet context, the Ninth Circuit "has recognized that 'tortious conduct on a nationally accessible website' is considered express aiming when the operation of that website is combined with . . . 'conduct directly targeting the forum.'" Cornett v. Gawker Media, LLC, No. 2:13-CV-01579-GMN, 2014 WL 2863093, at *3 (D. Nev. June 23, 2014) (citing Mavrix, 647 F.3d at 1229). The same analysis applies to mobile applications that access the Internet since they are, "for purposes of personal jurisdiction, equivalent to websites." Zherebko v. Reutsky, No. C 13-00843 JSW, 2013 WL 4407485, at *4 (N.D. Cal. Aug. 12, 2013). While maintenance of a "passive website" alone may not be enough to establish jurisdiction, "operating even a passive

1 website in conjunction with ‘something more’ . . . is sufficient.” Mavrix, 647 F.3d at 1229
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3 (citations omitted).
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5 In Mavrix, the Ninth Circuit found that revenue from user-driven advertising on a
6 website, coupled with evidence of users in the forum, supported the exercise of personal
7 jurisdiction. 647 F. 3d at 1230. There, the plaintiff sued the operator of a celebrity gossip
8 website after it published the plaintiff’s copyrighted photos. Id. at 1222-23. The website did not
9 sell any products, was owned and operated completely in Ohio, and did not advertise in
10 California. Id. at 1224-25. The Court nonetheless found specific jurisdiction in California
11 because the defendant “continuously and deliberately exploited the California market:”
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19 [Defendant] makes money by selling advertising space on its website to
20 third-party advertisers: the more visitors there are to the site, the more hits
21 that are made on the advertisements; the more hits that are made on the
22 advertisements, the more money that is paid by the advertisers to
23 [defendant]. A substantial number of hits to [defendant’s] website came
24 from California residents.
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27 Id. at 1230.
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29 Likewise, the Pokellektor App and Website earn revenue generated from users and
30 visitors. Primarily, 
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35 Supp. Jennison Decl., Ex. A (Frasier Dep. at 17:4-18:11, 19:4-16, 21:3-22:2, 22:10-18, 79:16-20,
36 126:5-128:15), Ex. F (Frasier Dep. Ex. 20). Notably, these links are intrinsically tied to the
37 copyright-infringing Images; users must view an Image to obtain the pricing information and
38 links to purchase a card. Id.; see also Compl. ¶ 32 (example of links from App) & Ex. E at 20
39 (example of links from Website). Further, Frasier earns revenue from banner advertising in the
40 App, including revenue earned when users view or click on banner ads. Supp. Jennison Decl.,
41 Ex. A (Frasier Dep. at 30:22-31:24, 33:21-34:5); see also Compl. ¶¶ 29, 32 (examples of banner
42 ad). This revenue covers Frasier’s monthly costs of operating the Website. Supp. Jennison
43 Decl., Ex. A (Frasier Dep. at 30:22-31:24, 33:21-34:5).
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1 There can be no question that this revenue is earned, in part, from activities in the State of
2 Washington. A substantial number of visits to the Website, registered users of the Website, and
3 users of the App are located in or otherwise tied to Washington. See supra, Section II.A. While
4 no records reflect the exact amount of revenue from activities in Washington, Washington is the
5 tenth highest state in terms of use of the Website and has more than 1,600 App users. Supp.
6 Jennison Decl., Ex. A (Frasier Dep. at 76:10-24), Ex. G (Apple Decl., ¶ 8). Thus, like the
7 defendant in Mavrix,⁴ Frasier has exploited the Washington market to obtain revenue.
8 “[W]here . . . a website with national viewership and scope appeals to, and profits from, an
9 audience in a particular state, the site’s operators can be said to have ‘expressly aimed’ at that
10 state.” Id. at 1230.

11 Frasier may argue that he did not expressly target Washington or know how many users
12 were in Washington, but that is irrelevant. Frasier has chosen to distribute his infringing App
13 and Website all over the world, and he is reaping the benefits from his infringing activities
14 (albeit modest benefits to date) both in and out of Washington. Had he chosen to view the
15 analytics that are available to him he would have known that he had users in Washington.
16 Accordingly, he had constructive knowledge of his Washington activities. See, e.g., DFSB
17 Kollegiate Co. v. Bing Yang, No. C 11-1051 CW, 2013 WL 1294641, at *6 (N.D. Cal. Mar. 28,
18 2013) (finding that website “hit counters” showing number of visitors supported finding of actual
19 or constructive knowledge of users in the forum state).

20 Moreover, Frasier’s App and Website are not passive. Frasier allows users to register for
21 his Website, and once registered, users can store information about their personal collections on
22 the Website. Supp. Jennison Decl., Ex. A (Frasier Dep. at 43:15-20); Compl., Ex. E at 14 (“You
23 must be logged in to track your collection.”). There are at least 22 registered users from
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25 ⁴ In Mavrix, the Court noted that some third party advertisers on the defendant’s website had ads that
26 specifically targeted the forum. But such targeted advertising is not a requirement; the Court there used it only as a
27 proxy for proof of actual users in the forum. 647 F.3d at 1230. Here, there is ample evidence of users in
28 Washington.

1 Washington. See Gonzalez Decl. ¶ 3. Users also can (and do) comment on particular Images on
2 the website. See Compl., Ex. E at 22 (example of comments). Frasier encourages users to
3 submit infringing images to him for display on the Website and App. Compl., ¶ 32 (image of
4 App), Ex. E at 14 (“We have very few scans from this set. Consider submitting some[.]”). And
5 finally, Frasier sells products on his Website. Supp. Jennison Decl., Ex. H. In Mavrix, the court
6 found that similar features increased the interactive nature of the website and supported a finding
7 of personal jurisdiction. 647 F.3d at 1222 (allowing visitors to comment on articles, join a
8 membership club, and submit news tips and photos of celebrities increased interactivity of
9 website).

10 In his Motion and Reply, Frasier relied on the Supreme Court’s statement in Walden v.
11 Fiore, that the relationship between the defendant and the forum must arise out of “contacts that
12 the ‘defendant himself creates with the forum State.’” __ U.S. __, 134 S. Ct. 1115, 1122 (2014)
13 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174 (1985)). As
14 demonstrated above, through his infringing activities, Frasier has created his own contacts with
15 Washington, even if this Court discounts the intentional injury he is causing to Pokémon. In
16 Walden, the defendant seized cash from the plaintiffs (Nevada residents) in Georgia, who then
17 filed a lawsuit in Nevada, alleging improper seizure. Walden, 134 S. Ct. at 1119-20. The Court
18 found that the defendant lacked sufficient contacts with Nevada because “no part of
19 [defendant’s] course of conduct occurred in Nevada.” Id. at 1124. But that holding regarding a
20 physical event (seizing money) in a physical location (Atlanta) has no applicability here, where
21 Frasier took intellectual property belonging to Pokémon in Washington and distributed it around
22 the world (including in Washington), earning revenue from that distribution in Washington (and
23 elsewhere). Indeed, the Supreme Court noted that the Walden facts, “do[] not present the very
24 different questions whether and how a defendant’s virtual ‘presence’ and conduct translate into
25 ‘contacts’ with a particular State.” See id. at 1125 n.9.

1 With respect to the last prong of the effects test, Frasier cannot dispute that he knew that
2 his activities caused harm likely to be suffered in Washington. In copyright cases, "this
3 requirement is generally satisfied when the plaintiff resides in the forum state." DFSB
4 Kolletive Co., 2013 WL 1294641, at *7; see also Mavrix, 647 F.3d at 1231 (economic loss
5 caused by the intentional infringement of a plaintiff's copyright is foreseeable in that plaintiff's
6 principal place of business).
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12 Even when examining only Frasier's contacts with Washington outside of Pokémon, it is
13 plain that the Pokellector Website and App are aimed at Washington and caused harm in
14 Washington. Accordingly, this Court has jurisdiction over Pokémon's claims.
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19 IV. CONCLUSION

20 For the foregoing reasons, the Court should deny Frasier's Motion to Dismiss and Motion
21 to Transfer Venue.
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24 DATED this 10th day of October, 2014.
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28 s/ Judith B. Jennison, WSBA No. 36463

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CERTIFICATE OF SERVICE

I certify that on April 11, 2014, I caused the foregoing **PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR, IN THE ALTERNATIVE, TO TRANSFER VENUE** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individual of record. In addition, I caused service to be made on the same individuals of record by the method indicated:

Shannon M. Jost, #32511	—	Via hand delivery
Theresa H. Wang, #39784	—	Via U.S. Mail, 1st Class, Postage
Stokes Lawrence, P.S.	—	Prepaid
1420 Fifth Avenue, Suite 3000	<u>X</u>	Via E-Filing
Seattle, WA 98101-2393	—	Via Overnight Delivery
Sarah M. Matz (pro hac vice)	—	Via Facsimile
Adelman Matz P.C.	—	Via Email
425 Park Avenue, 27th Floor	—	Other: _____
New York, NY 10022	—	

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of October, 2014.

By: /s/ Breena Roos
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